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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re K.G., a Person Coming Under the Juvenile Court Law.	
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. J.G., Defendant and Appellant.	C061484 (Super. Ct. No. JD224907)

Appellant J.G., the father of the child K.G. (born March 2006), appeals from the juvenile court's orders denying his petition for modification and terminating his parental rights. (Welf. & Inst. Code, §§ 366.26, 388, 395.)[1] Appellant contends: The juvenile court should have applied the

[1] Hereafter, undesignated statutory references are to the Welfare and Institutions Code.

parent-child relationship exception to terminating parental rights; denying his petition for modification was an abuse of discretion; and, the notice provisions of the Indian Child Welfare Act (ICWA) were inadequate. We shall affirm.

BACKGROUND

In August 2006, the Sacramento County Department of Health and Human Services (DHHS) received a referral from the UC Davis Medical Center that appellant punched the child's mother in the face and pushed her out of a moving car in the child's presence. The mother told a social worker that, while driving to his aunt's house, appellant punched her in the face four times while she was holding the child. Once they arrived, the mother entered the house and set the child down; appellant then struck her in the face with a closed fist. She went to the car, but appellant pulled her out and said he would drive her. Later, appellant pushed her out of the car as it was going about 10 miles per hour.

In October 2006, DHHS filed a petition alleging jurisdiction under section 300, subdivision (b) (failure to protect). The child was detained in October 2006. In December 2006, the juvenile court sustained the petitions, continued placement outside the home, and ordered services for the parents.

The parents filed JV-130 forms with DHHS in October 2006, with the mother claiming Cherokee and appellant Choctaw heritage. Later that month, DHHS notified the relevant tribes and the Bureau of Indian Affairs (BIA). In November 2006, the

mother indicated she had Cherokee and Blackfoot heritage. A DHHS paralegal later spoke to the maternal great-grandmother, who stated that appellant had Cherokee and the mother had Cherokee, Choctaw, and Blackfeet heritage. The paternal aunt also affirmed appellant's possible Cherokee heritage. In February 2007, DHHS sent a second ICWA notice to the relevant tribes, with the notice indicating possible Blackfeet heritage for the maternal grandfather and maternal great-grandfather, but not identifying the Blackfeet as a tribe for the mother.

DHHS received more information from the maternal great-grandmother on the day the second notice was mailed. A third and final notice was sent to the relevant tribes in February 2007. Once again, Blackfeet heritage was identified for the maternal grandfather and maternal great-grandfather, but the mother's tribes were identified as Cherokee and Choctaw. The notified tribes either sent letters denying membership for the child or the parents, or never responded. In May 2007, the juvenile court found the ICWA did not apply.

The juvenile court sustained an amended petition (§ 387) seeking removal of the child from the caretaker in April 2007. The caretaker voluntarily relinquished the child because she had been receiving threatening calls from the parents, even after the child was removed from her care.

As of April 2007, appellant had not complied with services, having failed to complete his counseling and domestic violence classes. However, he had regular and positive supervised visits with the child.

The child was placed in a confidential foster home. Appellant's visits were going well, but he was hostile to the social worker, leaving a phone message stating: "I guess I'm just go[ing to] have to go to jail for whatever happens and you can record this." The social worker related that appellant had called the previous caretaker a "bitch" and made hand gestures as if he was shooting her. Appellant subsequently apologized to the social worker, saying he was frustrated because he was not the offending parent.

The child was placed with her mother in May 2007. In September 2007, the mother reported seeing appellant's girlfriend appearing bruised and frazzled, as if she was the victim of domestic violence. Appellant denied the contention, claiming the mother fabricated the charge because she was angry with appellant.

Appellant completed his domestic violence prevention group in October 2007, but had not completed his parenting course. His counselor, John Kress, reported that appellant had missed nine of 21 sessions in the last four months, was reluctant to accept responsibility for his role in the events leading to the dependency action, and was hostile to Children's Protective Services. Kress concluded that appellant's noncompliance and poor attitude left the child at risk.

A March 2008 permanency review report recommended terminating services for appellant. Appellant had not participated in services since August 2007, claiming he was too busy with personal matters. He continued to visit the child two

to three times a week, sharing a close connection with her. Appellant waived services in March 2008. Appellant's visitation with the child continued.

In April 2008, appellant was arrested after an incident where he had his hands around his girlfriend's neck for five to ten seconds and pushed her by the shoulders. The child was present during the assault. Appellant told a social worker there was an incident with his girlfriend in April 2008, but claimed the child was in another room.

The mother related an incident in July 2008 where appellant arrived at her home unannounced, slapped her in the face, took the minor, and drove off. Paternal relatives returned the child within two hours. The mother's failure to follow through with measures to protect the child from appellant led to the filing of a supplemental petition (§ 387) in September 2008. The child was detained later that month, and the supplemental petition was sustained in October 2008.

A psychologist conducted a bonding assessment by observing a visit between appellant and the child. The child was thoroughly comfortable and calm with appellant; she was clearly not ready for her time with him to be over, and insisted that appellant accompany her when they left the visitation area. The psychologist concluded the child had a "strong, positive emotional attachment" to appellant which likely makes a positive contribution to her emotional well-being, and she would experience "some detriment to her emotional functioning" if her relationship with appellant was severed. However, given the

child's ability to form positive attachments to others, the advantages from permanent placement with caretakers who could ensure her safety could mitigate any detriment to a large degree.

In December 2008, the foster mother reported that she was called into the child's Sunday school class after the last two visits with appellant. The child had lifted up her dress yelling, "My daddy's going to beat me." She became very clingy after the outbursts, asking the foster mother to "stay close to me and not leave me."

The child had a significant relationship with the foster mother, whom she called "mom," and with whom she wanted to live. The foster mother, an employed, divorced single mother with no criminal history, wanted to adopt the child. The foster mother later reported that the child told her, "my daddy says you're not my mommy."

In February 2009, appellant filed a petition to modify (§ 388) seeking supervised custody of the child or the resumption of services. Appellant alleged as changed circumstances his completing a parenting class and obtaining employment. He believed he could now safely raise the child, and it would be in her best interests to be raised by her family. The petition attached a certificate of completion for 13 therapy sessions with Pauline Le Pierrot.

Appellant and Le Pierrot testified at the contested section 366.26 hearing. Appellant testified that the sum of his domestic violence with the mother was a verbal altercation

before the child's birth and an incident in 2006 where he "just pushed her out [of] the car" but "didn't throw her out [of] the car." He denied the April 2008 domestic violence allegation involving his girlfriend, claiming it was simply another "verbal altercation." Appellant also denied ever hitting the mother in the face.

He took responsibility "for everything that done happened because I know I could have avoided all this by making sure I completed my classes on time . . . ." Appellant also admitted to previously minimizing his domestic violence.

Appellant claimed he had addressed his domestic violence issues in his domestic violence classes, where he learned to take personal responsibility, to deal better with a relationship, communicate better, and understand why a person would say something. Therapy taught appellant how to stay away from other environments and learn to take blame rather than accusing others. He was also participating in an online coparenting class.

Appellant testified to his strong bond with the child, with whom he had been since her birth. He had a plan for her return, including a particular preschool for the child. Having acknowledged his problem with the mother, appellant testified that he can safely care for the child.

Le Pierrot testified that appellant completed 13 sessions of individual therapy. As a result, appellant "was able to take more responsibility for what had happened" during his relationship with the mother, and now had the tools to control

his anger. Le Pierrot opined that appellant is a very loving father whose anger "may have gotten the better of him" in some situations, but he had adequately addressed all the issues raised by DHHS in the referral. She had no concerns about his ability to be a safe parent.

On cross-examination, Le Pierrot admitted they did not much discuss the exact sort of domestic violence between appellant and the mother, instead focusing on "what domestic violence looked like and that it's not always physical." Le Pierrot did "not necessarily" need to know the amount of domestic violence between appellant and the mother to determine if appellant was minimizing. In therapy, she did not have any information about appellant punching the mother in the face, and did not address the second assault against the mother or the incident where appellant grabbed his girlfriend around the neck and pushed her. Responding to the juvenile court's inquiry, Le Pierrot admitted she did not actually discuss with appellant whether his incidents involved physical violence. However, she still believed appellant was not minimizing, because he now had a good understanding of what constituted domestic violence.

The juvenile court found that Le Pierrot was not credible because she never addressed the nature of the domestic violence incidents and therefore could not have addressed whether appellant was minimizing. The court denied appellant's section 388 petition and terminated parental rights.

DISCUSSION

I.

Appellant contends the court should have applied the parent-child exception and refrained from terminating parental rights. We disagree.

"'At the selection and implementation hearing held pursuant to section 366.26, a juvenile court must make one of four possible alternative permanent plans for a minor child. . . . *The permanent plan preferred by the Legislature is adoption.* [Citation.]' [Citations.] If the court finds the child is adoptable, it *must* terminate parental rights absent circumstances under which it would be detrimental to the child." (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368.) One such circumstance is that "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).)

The parent has the burden of establishing an exception to termination of parental rights. (Cal. Rules of Court, rule 5.725(d)(3); *In re Zachary G.* (1999) 77 Cal.App.4th 799, 809 (*Zachary G.*).) To meet this burden as to the beneficial parent-child relationship exception, it is not enough simply to show "some benefit to the child from a continued relationship with the parent, or some detriment from termination of parental rights." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1349 (*Jasmine D.*).) Nor is "frequent and loving" contact sufficient to overcome the preference for adoption; there must also be a

significant, positive emotional attachment between parent and child. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.) Even a strong positive bond with a parent may be insufficient to defeat adoption if a child looks to a prospective adoptive parent to meet his or her needs. (*Zachary G., supra*, at p. 811.) "Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*Jasmine D., supra*, at p. 1350.)

On appeal, we uphold a juvenile court's ruling declining to find an exception to termination of parental rights if supported by substantial evidence. (*Zachary G., supra*, 77 Cal.App.4th at p. 809.)

Relying on the testimony of his second therapist, Le Pierrot, the considerable evidence of his consistent, positive visits with the child, and the bonding report, appellant argues "[t]he relationship between [appellant] and the minor is exactly the kind of relationship that this exception is meant to address."

The bonding assessment concluded that the detriment from severing the bond would be largely ameliorated by permanently placing the child with a caretaker who could protect her. The child has such a person, the current foster mother, whom she called "mom," and who intended to adopt her. Nor was the relationship with appellant without cost to the child.

Appellant tried to undercut the foster mother, telling the child she was not the child's real mother. Also, two of the child's most recent visits with appellant led to disturbing behavior from her--lifting up her dress and yelling that appellant was going to beat her, and subsequently clinging to the foster mother while asking that she not leave.

Appellant's contention that "the idea that any positive relationship can and should be disposed of is unreasonable and outmoded" is contrary to the Legislature's directive. On this record, substantial evidence supports the trial court's ruling that the parent-child relationship exception did not apply.

II.

Appellant claims the juvenile court abused its discretion in denying his section 388 petition to modify. He is mistaken.

Section 388, subdivision (a), provides that the parent of a dependent child may petition the juvenile court "upon grounds of change of circumstance or new evidence . . . for a hearing to change, modify, or set aside any order of court previously made. . . ." Section 388 permits modification of a dependency order if a change of circumstance or new evidence is shown and if the proposed modification is in the best interest of the minor. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526 (*Kimberly F.*).)

When a petition for modification is brought after the end of the reunification period, the best interest of the child is the paramount consideration. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) In assessing the best interest of the child at this stage of the proceedings, the juvenile court looks to

the child's needs for permanence and stability. (*Ibid.*) The party petitioning for modification has the burden of proof by a preponderance of the evidence. (*Ibid.*) A modification petition "is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.)

Appellant argues that he changed circumstances by completing therapy, and that his last therapist, Le Pierrot, concluded he successfully addressed all the issues raised by DHHS. Relying on the bond between appellant and the child, appellant concludes that awarding custody or granting services to him would be in the child's best interests.

In *Kimberly F., supra*, 56 Cal.App.4th 519, the appellate court warned against the juvenile court simply comparing the situation of the natural parent with that of a caretaker in determining a section 388 petition. It termed such an approach the "'simple best interest test.'" (*Kimberly F., supra*, at p. 529.) Instead, the appellate court found that determining a child's best interests under section 388 required an evaluation of a number of factors, including the seriousness of the reason for the dependency action, the existing bond between parent and child and caretaker and child, and the nature of the changed circumstances. (*Id.* at p. 532.) The court suggested it was unlikely a parent who lost custody because of sexual abuse of a minor could prevail on a section 388 petition, whereas in a "dirty house" case, which was present in *Kimberly F.*, the

chances of success were greater. (*Id.* at pp. 531, fn. 9, 532.) In *Kimberly F.*, the court concluded the decision to deny the section 388 petition was based largely and improperly on the juvenile court judge's adoption of the "'narcissistic personality' rationale," which the judge had applied to the mother in that case. (*Id.* at pp. 526, 527, 532-533.)

In this case, in denying appellant's section 388 petition, the juvenile court explicitly mentioned the factors in *Kimberly F.* Evidence of all of the critical factors contained in *Kimberly F.*, including the basis of the dependency action, the relationship between appellant and the child, and the nature of the alleged changed circumstances, was before the court. The court's extensive comments about the case suggest it considered carefully all pertinent circumstances. On the record before it, the court concluded that appellant failed to sustain his burden. Under the abuse of discretion standard, we see no error in that determination.

The juvenile court was required by statute (§ 388) to focus on the child's best interests in deciding whether to grant the petition for modification. As we have seen, those interests consist of the child's needs for stability and permanence. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Childhood cannot wait for a parent to establish readiness for parenting. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.)

Here, the child had shown the ability to bond with other adult figures. On the other hand, appellant, who originally

abandoned services, was still working on the problems that had contributed to the dependency proceedings.

Although Le Pierrot claimed appellant successfully addressed the problems leading to the dependency action, appellant had not completed the services first offered, and more importantly, his testimony continued to minimize his domestic violence.

In addition, the juvenile court was entitled to conclude that Le Pierrot's testimony was suspect, as she ignored the nature of appellant's domestic violence, and apparently did not know about the second incident involving the mother or the attack on his girlfriend. The juvenile court concluded Le Pierrot was not a credible witness, and we give great deference to that determination. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.) On this record, the juvenile court did not err in ruling the child should not be forced to wait any longer.

Appellant's problem is significant--repeated incidents of domestic violence. At best, he has shown changing rather than changed circumstances. In the over two and one-half years since the inception of the dependency action, appellant finally managed to complete a part of his services. However, he still had considerable work to do as appellant continues to minimize his domestic violence. He has shown anger throughout the dependency, attacking the mother and his girlfriend, threatening one of the child's caretakers, and leaving threats with a DHHS social worker. His more recent conduct undercutting the foster

mother does not inspire confidence that appellant has truly changed or that granting him custody of further services would be in the child's best interests.

Under the circumstances of this case, the juvenile court did not act arbitrarily, capriciously, or beyond the bounds of reason in denying the petition for modification. The court's determination that the child's need for permanency compelled denial of the petition and served the child's best interests was reasonable and is supported by the record. There was no abuse of discretion or other error in the court's decision.

III.

Appellant's final contention is that DHHS and the juvenile court failed to comply with the notice requirements of the ICWA. We disagree, finding any error to be harmless.

ICWA provides, in part: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." (25 U.S.C.S. § 1912(a).) The Indian status of a child need not be certain or conclusive to trigger the ICWA's notice requirements. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 471.) California Rules of Court, rule 5.481, contains identical requirements. (Cal. Rules of Court, rule 5.481(b).)

DHHS and the juvenile court have an affirmative and continuing duty to inquire whether a child who is subject to the proceedings is, or may be, an Indian child. (Cal. Rules of Court, rule 5.481(a).) If, after the petition is filed, the court "knows or has reason to know that an Indian child is involved," notice of the pending proceeding and the right to intervene must be sent to the tribe or the Bureau of Indian Affairs if the tribal affiliation is not known. (25 U.S.C.S. § 1912; Cal. Rules of Court, rule 5.481(b).) Failure to comply with the notice provisions and to determine whether the ICWA applies is prejudicial error. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424; *In re Desiree F., supra*, 83 Cal.App.4th at p. 472.)

Appellant asserts DHHS received information that appellant had possible Cherokee and Choctaw heritage and the mother had possible Cherokee, Choctaw, Blackfoot, Blackfeet and Yaqui heritage. He claims DHHS failed to comply with the ICWA because it sent out notices claiming that appellant only had Cherokee heritage, and did not mention the mother's possible Yaqui, Blackfoot, or Blackfeet heritage.

Appellant's contention regarding the Blackfoot is without merit because, unlike the Blackfeet, the Blackfoot are not a federally recognized tribe and thus not subject to the notice provisions of the ICWA. (73 Fed.Reg. 18553 (Apr. 4, 2008) [listing the "Blackfeet Tribe of the Blackfeet Indian Reservation of Montana"].) We likewise reject his contention regarding the Yaqui tribe. The only mention of the Yaqui tribe

is an informational memorandum from a paralegal stating that another paralegal had "received the ICWA referral for this case indicating the above-named child has Yaqui ancestry on the maternal side of the family and unknown heritage on the paternal side of the family." Here, the record shows that the parents and parental relatives indicated Cherokee and Choctaw heritage for the appellant, and Cherokee, Choctaw, and Blackfeet heritage for the mother, but there is no indication that either parent ever claimed Yaqui heritage. The memo from the paralegal, which gets every detail of the parents' claims of Indian heritage wrong, is a clerical error which DHHS properly ignored.

We also reject appellant's contention regarding his claim of Choctaw heritage. He is correct that while he claimed possible Choctaw heritage, the second and third ICWA notices indicated only possible Cherokee heritage for appellant. However, in the first ICWA notice sent to the relevant Choctaw tribes, appellant was identified as having possible Choctaw heritage. Before the second and third ICWA notices were sent, all of the Choctaw tribes sent letters denying tribal membership for appellant. We conclude that the error, if any, related to appellant's possible Choctaw heritage was harmless. (*In re Alexis H.* (2005) 132 Cal.App.4th 11, 16 [errors in ICWA notice are subject to harmless error review].)

Appellant's claim regarding the mother's possible Blackfeet heritage is also harmless. The mother claimed possible Blackfeet heritage after the first ICWA notice. The two subsequent ICWA notices did not list Blackfeet as one of the

mother's tribes, but listed the Blackfeet affiliation for the maternal grandfather and maternal great-grandfather. Since the notices indicated that maternal relatives had possible Blackfeet heritage, the error in failing to claim Blackfeet affiliation for the mother was harmless.

DISPOSITION

The juvenile court's orders are affirmed.

CANTIL-SAKAUYE, J.

We concur:

SCOTLAND, P. J.

ROBIE, J.